

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 08-39
MARGARET SUNDERLAND)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On August 29, 2008, the Vermont State Employees' Association ("VSEA") filed a grievance/classification appeal on behalf of Margaret Sunderland ("Grievant") concerning the downward reallocation of Grievant's position from a Public Health Chemist III to a Public Health Chemist II, and the downgrade of the pay grade of position from 22 to 20. Specifically, the grievance/appeal contended:

- the reclassification of Grievant's position and reduction of her pay grade was clearly erroneous, and arbitrary and capricious, in violation of Article 16 of the collective bargaining agreement between VSEA and the State of Vermont for the Non-Management Unit ("Contract");
- the employer's efforts to adversely influence the classification review process, and its reclassification and reduction of the pay grade of Grievant's position, violated the prohibition in Article 5 of the Contract of discriminating against, intimidating or harassing employees because of sex, filing a complaint or grievance, or any other factor for which discrimination is prohibited by law;
- the reclassification and reduction of pay grade of Grievant's position violated her right pursuant to Article 15, Section 6, of the Contract to file complaints and grievances without threats, reprisal or harassment by the employer; and

- the Employer improperly failed to determine Grievant's rate of pay after reclassification in accordance with Article 45, Section 12, of the Contract.

Hearings were held in the Labor Relations Board hearing room in Montpelier on January 28, April 22, and April 29, 2010, before Board Members Richard Park, Acting Chairperson; Leonard Berliner and James Kiehle. Grievant represented herself. Assistant Attorney Generals Marie Salem and William Reynolds represented the State. Grievant and the State filed post-hearing briefs on June 10, 2010.

FINDINGS OF FACT

1. The Contract provides in pertinent part as follows:

...

ARTICLE 5 NO DISCRIMINATION OR HARASSMENT; and AFFIRMATIVE ACTION

1. NO DISCRIMINATION, INTIMIDATION OR HARASSMENT

In order to achieve work relationships among employees, supervisors and managers at every level which are free of any form of discrimination, neither party shall discriminate against, intimidate, nor harass any employee because of . . . sex, . . . filing a complaint or grievance, or any other factor for which discrimination is prohibited by law. . .

...

ARTICLE 15 GRIEVANCE PROCEDURE

...

6. The parties agree, subject to applicable law, that every employee may freely institute complaints and/or grievances without threats, reprisal or harassment by the employer.

...

ARTICLE 16 CLASSIFICATION REVIEW and CLASSIFICATION GRIEVANCE

...

3. PROCEDURE FOR REVIEW OF CLASSIFICATION

...

(b) Employee and management requests for classification review shall be made on a form provided by the Commissioner of Human Resources. . . The form shall be fully completed by the employee or management as appropriate. . . . The request for review shall state with particularity the change(s) in duties or other circumstances which prompt the Request for Review. The position's supervisor shall review the information provided on the form . . . , completing that portion which requests supervisory responses, and submit further written responses as appropriate. The Request for Review form shall then be submitted to the position's appointing authority, who shall review it for accuracy, comment as deemed appropriate, and forward the original to the Department of Human Resources . . .

(c) . . . In its discretion, the Department may conduct field audits as necessary. . .

(T)he Department of Human Resources or duly constituted departmental review committee will review and respond to complete requests for review. Such written report will respond directly and pointedly to the specific reasons listed in the request for review and will specify any change in the point factor rating for that position. The definitions of the sub-factors used in the point factor ratings will be provided as a guide to interpreting the point factor rating.

(d) Within ten (10) workdays of receipt of the notice from the Department of Human Resources, an employee may request an informal meeting with . . . the member of the Classification Division who performed the rating . . . for a discussion of the decision.

..

(e) Notwithstanding the above, if corrective action results from either classification review or a classification grievance, any pay adjustment shall be retroactive to the date when a completed Request for Review was logged by the Department of Human Resources, unless the Commissioner of Human Resources determines that the circumstances giving rise to such corrective action came into existence after completed filings, in which case retroactivity shall be effective on that later date.

...

4. CLASSIFICATION GRIEVANCE

(a) Notwithstanding any contrary provision of this Article, a classification grievance may be filed only if the position submitted for review was not changed to a higher pay grade.

...

(c) A classification grievance shall be filed within thirty (30) days of the receipt of the classification review official notification, or within fifteen (15) days of the date of the notice of the results of the informal meeting with a member of the classification division if such a meeting is requested.

...

5. BURDEN OF PROOF

In any stage of proceeding under this Article the burden shall be on the grievant to establish that the present classification, pay grade assignment, or any subsequent classification decision arising from the application of these procedures, is clearly erroneous under the standards provided by the point factor analysis system utilized by the Department of Human Resources.

6. EXCLUSIVE REMEDY

The grievance and appeal procedures provided herein for classification disputes shall be the exclusive procedures for seeking review of the classification status of a position or group of positions.

7. APPEAL TO VLRB

An employee aggrieved by an adverse decision of the Commissioner of Human Resources may have that decision reviewed by the Vermont Labor Relations on the basis of whether the decision was arbitrary and capricious in applying the point factor system utilized by the State to the facts established by the entire record. . . . The board shall not conduct a de novo hearing, but shall base its decision on the whole record of the proceeding before, and the decision of, the Commissioner of Human Resources (or designee). The VLRB's authority hereunder shall be to review the decision(s) of the Commissioner of Human Resources, and nothing herein empowers the Board to substitute its own judgment regarding the proper classification or assignment of position(s) to pay grade. If the VLRB determines that the decision of the Commissioner of Human Resources is arbitrary and capricious, it shall state the reasons for that finding and remand to the Commissioner for appropriate action. . .

. . .

ARTICLE 45 SALARIES AND WAGES

12. . . (b) . . . (W)hen an employee voluntarily demotes one (1) or two (2) pay grades (whether by classification action or otherwise), the rate of pay shall be "red-circled" and shall not be subject to a reduction. Such employee will move to the step next above his/her red-circled rate on the next step date, except when the salary is over the maximum for the pay grade or falls on a step in the new Pay Grade. The next step date in such cases shall be based on the effective date of the demotion, and will be calculated on the required time on step assigned to the step next below the employee's red circled rate. Nothing in this agreement shall restrict or preclude the employer from discussing voluntary demotion or downward reallocation with an employee for other than disciplinary reasons.

. . .

(State's Exhibit 14)

2. Grievant has been a Chemist with the Department of Health since 1988. In 2002, Grievant's position was reallocated from the class Senior Chemist, Pay Grade 21, to the class Public Health Chemist III, Pay Grade 22 (Grievant's Exhibit 16).

3. Grievant contacted Lieutenant Governor Brian Dubie's office in 2003 about concerns she had with the management of federal grants by the Department of Health laboratory which involved inductively coupled plasma-mass spectroscopy ("ICP-

MS”) analysis of clinical samples. Among the concerns she expressed was that her supervisor, Environmental Chemistry Program Chief George Mills, was unqualified to perform certain duties of his job. On August 23, 2003, Laboratory Director Mary Celotti sent a memorandum to Grievant responding to her concerns. Celotti sent a copy of the memorandum to Commissioner of Health Paul Jarris, Health Surveillance Director Bill Apao, and Mills (Grievant’s Exhibit 14).

4. Grievant filed a grievance with the Labor Relations Board in 2005 against the Employer, contesting an unsatisfactory annual performance evaluation she received for the 2003-2004 rating period. Grievant and the Employer entered into a stipulation on February 28, 2006, resolving the grievance. The stipulation provided in pertinent part:

1. Grievant and her supervisor, George Mills, will work with a communications consultant to improve the working relationship between Grievant and her supervisor;
2. Grievant will participate in a formal supervisory referral to the Employee Assistance Program (“EAP”). Grievant will follow EAP requirements to allow for “release time” to attend up to 5, hour and a half counseling sessions which are provided as a no cost benefit to state employees. . .
3. Grievant’s performance evaluation for the 2003-04 rating period will be withdrawn from her personnel file and Grievant shall receive her step increase retroactive to October 7, 2005.
4. Grievant will receive no performance evaluation for the 2004-05 period.
5. Beginning on a date certain (“start date”) to be determined by VDH, Grievant shall no longer be responsible for ICP-MS testing and will be assigned to perform testing in such areas as anions, flame metals, physicals, radon in air, and blood lead. The parties agree that in order to affect(sic) the change in Grievant’s responsibilities it will be necessary for VDH to change responsibilities of other staff and train some staff in new duties. The parties also agree that prior to the start date there will need to be a transition period to accommodate both the change in staff responsibilities and any resulting training necessary. The start date shall be implemented by VDH as soon as is practical, but no later than six months from the date this agreement is fully executed.
6. Three months from the start date VDH will submit a request for review (“RFR”) to the Department of Human Resources to determine if the change in Grievant’s duties requires a change in Grievant’s classification as a Chemist III. The RFR will be submitted without a recommendation as to job class or title or

pay grade. Any resulting change in job class will be subject to article 45, section 12 (b) of the contract.

7. The start date shall be the anniversary date for Grievant's future performance evaluations. Grievant's next performance evaluation will be due one year from the start date.
(State's Exhibit 1)

5. Mills sent Grievant a memorandum dated August 28, 2006, which provided in pertinent part as follows:

This memorandum is to document that we met about Job Duties and Expectations on August 10, 2006. During that meeting you were given a copy of job duties and expectations and asked to provide any questions or concerns to me by August 11, 2006. As you are aware you have not been the primary analyst for ICP/MS work for sometime now. The stipulation requires a start date. As we discussed Job Duties and Expectations on August 10, 2006, and you provided no issues on the 11th, August 14, 2006 is the appropriate start date. Attached you will find the Job Duties and Expectations . . .
(State's Exhibit 2)

6. Attached to the memorandum was a document setting forth Grievant's job duties and the expectations of her. The document contained a sentence providing:

"Margaret has been assigned and is now responsible for testing anions, flame metals, furnace AA (blood and water lead), and physicals." (State's Exhibit 2, emphasis in original)

7. The Department of Health performs ICP-MS analysis of clinical samples in cooperation with the Center for Disease Control. ICP-MS involves reviewing blood and urine specimens for various metals. ICP-MS is a difficult analysis, requiring complex instrumentation. Grievant was the primary ICP-MS analyst from 2000 through the next several years. By 2006, Grievant no longer was the primary ICP-MS analyst. Patricia McClard, a Department of Health employee performing ICP-MS tests, left employment on August 11, 2006. This left a void in the performing of ICP-MS tests until Kelly Bradshaw was hired as a Chemist IV to replace her in late October 2006. During

the interim between McClard's departure and Bradshaw's arrival, Grievant performed some maintenance and troubleshooting on the ICP-MS instrument. She was not responsible for any ICP-MS testing during this period.

8. After receiving the August 28, 2006, memorandum from Mills referred to in Finding of Fact No. 6, Grievant spoke to Celotti and Mills to inform them that the start date of her new duties should not be August 14, 2006, because she was continuing to perform some ICP-MS duties in violation of the February 28, 2006, stipulation. Mills informed Grievant that she may need to perform maintenance work on the ICP-MS instrument if necessary. Mills ended the conversation with Grievant without allowing more discussion. Grievant then returned to her desk and contacted a VSEA attorney and informed the attorney that the stipulation was being violated.

9. Blood lead testing is considered high complexity analysis under Clinical Laboratory Improvement Act ("CLIA") standards, involving complicated instrumentation. Blood lead testing is less complex than ICP-MS analysis. Blood lead testing can be performed by using graphite furnace atomic absorption, which is also referred to as furnace atomic absorption. Employees do not have to be Chemist III's or above to do blood lead testing. They can be Chemist I's, II's, III's or IV's as long as they have appropriate training and certification. CLIA requires certification for any clinical testing, including blood lead testing. Grievant performed the tests as a Chemist III. Edmond Luce performed the tests as a Chemist II or Chemist III. Patti McClard and George Voss did the test as Chemist IV's. These chemists performed this testing before the Request for Review was submitted. When the chemists performed blood lead testing

work, they were supervised by Toxicology Program Chief Robert Drawbaugh (Grievant's Exhibit 2, p.D000112; Grievant's Exhibit 13; State's Exhibit 15).

10. During the period January 2006 through November 2006, Grievant was assigned to perform blood lead testing approximately one week every three weeks. During the period December 2006 through April 2007, Grievant performed such testing on a total of four weeks (Grievant's Exhibit 14, p.0092-095).

11. On January 24, 2007, the Employer filed a Request for Review ("RFR") of Grievant's position to the Department of Human Resources. The RFR was accompanied by a cover letter from Maureen Barnes, Human Resources Specialist for the Employer, to Molly Paulger, Department of Human Resources Director of Classification, which provided in pertinent part:

This RFR is being submitted as part of a stipulation in the settlement of a grievance. The employee performing the position has been assigned different work over a period of time and the end result is what is included in the RFR that was completed by the supervisor.

As part of the stip, management and me were not allowed to recommend a job class of(sic) pay grade for the position, but to leave the classification up to the Analyst. Obviously, any questions about the duties, especially regarding how they compare to other levels of work can be directed to George Mills or Stella Celotti.

You will note that the employee choose(sic) to attach an addendum to the RFR . . . since this submission is a management one, I asked that the supervisor respond to the employee's addition and have attached his responses.

...
(State's Exhibit 3)

12. The RFR included among the description of job duties the following provisions:

...
Prepares and tests drinking water samples for anions, flame metals and physicals. By: following approved drinking water testing methods for chemical and physical testing. Testing such as turbidity, alkalinity, conductivity, hardness, ion selective

electrode testing such as pH and fluoride (automated anion analysis), preparation of radiochemistry samples, flame atomic emission/absorption. Approved methods include appropriate Quality Control (QC) testing. Function as a member of a team by assisting with other lab tasks as assigned. To provide accurate and timely test results to lab customers.

Provides analytical results for reports concerning analyses performed. . .

. . .

Occasional: Test samples/specimens using furnace atomic absorption. By: following approved laboratory procedures for testing lead in clinical specimens or lead in water. To produce accurate and timely test results.

((State's Exhibit 3)

13. Attached to the RFR was an Addendum completed by Grievant which included the following statement among a listing of "additional information": "Regularly perform Blood Lead analysis using advanced graphite furnace atomic absorption spectroscopy on blood samples." Included with the RFR was the following response by Mills to this statement by Grievant: "'Occasional as stated – Bob Drawbaugh agreed with this assessment.'" Grievant also made the following statement on the Addendum among a listing of "additional information": "From August 14, 2006 through September, 2006, performed troubleshooting, maintenance, and tuning for HP 4500, an inductively coupled plasma-mass spectroscopy instrument". Mills made the following response to this statement in materials included with the RFR: "Not a main job responsibility anymore, but she has stated that she helped troubleshoot the old HP 4500 (no longer in use at our lab) with the current analyst. Parts of some days." (State's Exhibit 3).

14. Paulger conducted the classification review of Grievant's position. Paulger has conducted classification reviews of thousands of positions during her employment. In addition to conducting classification reviews, Paulger supervised 2 or 3 classification analysts. In conducting the classification review of Grievant's position, Paulger evaluated

Grievant's duties from the date the RFR was filed through the date Paulger issued her decision on the classification of the position.

15. On January 30, 2007, Paulger requested by email that the Department of Health respond to the following question: "Is use of 'furnace atomic absorption' considered different (higher level) from use of other equipment, and if so what does that mean?" Mills responded by email that day: ""Blood Furnace AA is typically done by Chemist Levels I – IV. Check with Bob Drawbaugh the program Chief for blood lead area. I believe he has said that just doing blood lead would be at the Chemist I level without other types of responsibilities. Water Furnace AA is no longer being performed or assigned at this time. The work being done by Margaret in blood lead is at the entry level in my estimation – Chemist I, about once every 5 weeks." (State's Exhibit 12, Grievant's Exhibit 12)

16. Paulger never discussed with Drawbaugh during the classification review process whether Grievant was doing blood lead work at an "entry level" once every five weeks.

17. In July 2007, during the course of Paulger's classification review of Grievant's position, the Department of Health provided Paulger with a Public Health Chemist and Public Health Chemistry/Toxicology Lab Technician series grid. The Department of Health prepared the grid to support a decentralized allocation process they wished to engage in with the Department of Human Resources. Decentralized reallocation provided an opportunity for the Department of Health to work with the Department of Human Resources to clearly define job duties in a job series. Similar decentralization efforts had occurred in other departments in state government. The grid

was not prepared as a result of the classification review of Grievant's position. Paulger reviewed the information provided in the grid prior to making a classification decision on Grievant's position (State's Exhibit 9).

18. The Public Health Chemist and Public Health Chemistry/Toxicology Lab

Technician series grid provided in pertinent part as follows:

Examples of Work Performed	Chemist I	Chemist II	Chemist III	Chemist IV	Chemist V
...					
Performs low complexity analyses	x				
Performs moderate complexity analyses	x	x	x		
Performs high complexity analyses			x	x	x
...					
Performs data release for routine program area activities (low to medium complexity) such as for Toxicology: Blood lead, Drug Testing, Environmental Chemistry: anions, metals, Radon in air, gross alpha	x	x	x	x	
...					
Assumes lead role for specific low complexity analytical test procedures and equipment	x	x			
Assumes lead role for specific moderate complexity analytical test procedures and equipment			x	x	
Assumes lead role for specific high complexity analytical test procedures and equipment			x	x	x
...					
(State's Exhibit 9)					

19. The grid was supplemented by the following definitions for terms used in the grid:

Low Complexity Testing – Testing for which limited training and knowledge of analytical chemistry principles and methods is necessary to perform successfully. For these tests basic lab skills and test equipment are used. . .

Moderate Complexity Testing – Testing for which more advanced training and laboratory experience are needed for successful performance. For these tests a good knowledge of chemistry, application of more advanced analytical laboratory skills and training use of analytical instrumentation that requires multiple preparation steps before use and interpretation of operational status during use are required. Examples of such testing include: gas chromatography; spectroscopy, such as uv, visible, infrared and flame atomic emission/absorption; gas proportional counters, liquid scintillation counting and graphite furnace spectroscopy. . .

High Complexity Testing – Testing for which specialized training and substantial laboratory experience are needed for successful performance. . . Examples of such testing include: single and triple quadrupole mass spectroscopy; gamma emission spectroscopy and high performance liquid chromatography. . .

(State's Exhibit 9, p.0045A)

20. The Department of Human Resources uses the Willis Guide to Position Measurement to determine the classification of positions in state governments. The Willis Guide provides in pertinent part as follows:

I. EVALUATION CONSIDERATIONS

Position measurement is the determination of the relative content of jobs, one to another, within an organization. Often referred to as job evaluation, position measurement is one critical step in the development of the organization's pay plan. . . .

Before presenting a detailed explanation of the evaluation components and factors in the next section, it will be helpful to discuss some of the considerations and approaches to be used by evaluators in measuring each job.

Evaluate Job Content – The *facts* regarding the job's *actual job requirements* form the only legitimate basis for evaluation. Present salary, market supply, historical relationships, etc., have *no* bearing on job measurement. . .

Evaluate the Job, Not the Person or Job Title – Variations in performance of the individual occupying a job should not influence the evaluation. The job should be evaluated on the basis of its requirements, assuming a fully satisfactory level of performance . . .

Evaluate at Stretch Points – Every incumbent performs a mix of duties, some of which require greater skills and responsibilities. . . The job, however, should be evaluated on the basis of the highest skill or most challenging level required as a *normal part of the job*.

II. EVALUATION COMPONENTS AND DIMENSIONS

. . . Jobs are evaluated according to four components which are characteristic of all jobs. Each component contains two or three dimensions:

- Knowledge and Skills
 - Job Knowledge
 - Managerial Skill
 - Interpersonal Skills
- Mental Demands
 - Independent Judgment
 - Problem Solving
- Accountability
 - Freedom to Take Action
 - Size of Impact
 - Nature of Impact
- . . .
 - Working Conditions
 - Physical Effort
 - Hazards
 - Discomfort

. . . Each of these dimensions contains a series of levels, providing a scale of increasingly higher degrees of job content. . .

1. Knowledge and Skills

. . .
A. Job Knowledge – This dimension measures the amount of specialized or technical knowledge required by the job. . . Job knowledge is measured in *breadth* (comprehensiveness) and *depth* (thoroughness). . .

. . .
Level E – This level is appropriate for jobs requiring *full competence in a specialized or technological field*. This is equivalent to a post-secondary

degree or advanced degree plus sufficient experience in applying the principles and practices to a range of situations. . .

...

B. Managerial Skills – This dimension deals with the *nature and complexity* of the management process required of the job. . .

...

Level 1 – This level is appropriate for jobs executing specific tasks with no identifiable managerial requirements *and* for those performing supervision or one or more activities or subfunctions. Clearly, most jobs in an organization fall into this level.

...

C. Interpersonal Skills – This dimension measures the direct *people contact* or *human relations skills* required of a job. It deals with the extent to which the job must be able to establish rapport with, empathize with, and influence the actions of others. It does not matter whether the others are within or outside of the organization, or whether they are peers, subordinates or superiors. The nature of the skills necessary to influence them is to be measured.

...

Level X – Jobs at this level are *expected to interact with others* beyond the immediate work team. No special requirements exist, however, to influence or motivate the activities of others. Contacts tend to be limited to the exchange of information, such as accounting results, or material, such as supplies.

Level N – This level fits jobs in which *influencing* others is a *major responsibility*. It could be thought of as nudging others along a path in which they may be inclined to follow. Alternatively, the level is appropriate for jobs in which *personal serving* others is a major responsibility. An example might be a job having regular and frequent personal contact with customers or members of the public to respond to questions or provide assistance.

...

2. Mental Demands

This component measures the requirements to analyze alternatives and to solve problems. . .

A. Independent Judgment . . .

Level D – Jobs at this particular level have a variety of *varied and/or complex procedures*. Additionally, there is a wide range of alternatives to be selected from in accomplishing the work. Jobs at this level can be thought of being given the *what* to do, but the job has some discretion in regard to *how* to do it.

Level E – At this level, the job is doing its thinking within the *policies and goals* for a specific department or operating entity. This is the level at which a job will devise and set procedures for others.

...

- B. Problem Solving – This dimension measures the nature and complexity of the problems the job encounters and must solve. . .

Level 3 – Jobs required to analyze problems containing a substantial degree and diversity of data belong at this level. The problems, however, tend to be *generally recurring* and of a *similar* type. Many higher level clerical jobs as well as supervisory jobs are evaluated at Level 3.

Level 4 – This level defines jobs which not only analyze non-routine problems containing a wide variety of data, but must also engage in *evaluative* thinking. This level is characterized by jobs that deal with complex problems and must weigh the desirability and/or probability of possible outcomes in relation to each other. The incumbent must think a problem out several steps into the future.

...

(State's Exhibit 16, emphasis in original)

21. Points are assigned to each of the four job components under the Willis system based on the levels of the dimensions under each component. There is a range of points that can be assigned at each level of a component. For example, a rating of "E1X" under the "Knowledge and Skills" component can result in 140, 160 or 184 points. A rating of "E1N" under this component can result in 160, 184 or 212 points. A rating of "D1S" under the "Accountability" component can receive 53, 61 or 70 points. The points awarded by the classification analyst in each of the four components are totaled for a position. Then a pay grade for the position is assigned based on the total number of points. A pay grade 20 position has a point range of 302 – 332 points. The point range for a pay grade 21 position is 333 – 365 points. The point range for a pay grade 22 position is 366 – 402 points (State's Exhibit 16).

22. Paulger issued a Notice of Classification Action on October 19, 2007. The Notice changed the title of Grievant's position from PH Chemist III to PH Chemist II and reduced the pay grade from 22 to 20. The Notice provided in pertinent part:

Summary of Classification Review & Decision:

A review of the submitted description for your position indicates that there have been changes in the job duties assigned. As a result, your position has been downwardly reallocated to job class Public Health Chemist II, pay grade 20

Willis Rating/Components:

Knowledge & Skills	E1X	184
Mental Demands	D3I	61
Accountability	D1S	70
Working Conditions	L2B	9
Total Points		324

...
(State's Exhibit 4)

23. Paulger rated the responsibilities of Grievant in blood lead testing primarily in the knowledge and skills portion of the ratings system.

24. Celotti, Mills and Barnes requested to meet with Paulger after she issued the Notice of Classification Action. At the meeting, Celotti, Mills and Barnes expressed concern that Grievant's position was rated as Chemist II, Pay Grade 20. They expressed the view that her duties were more like the lower-rated Chemist I position. Paulger did not make any changes in the classification decision as a result of this meeting.

25. Grievant requested an informal meeting to discuss Paulger's decision pursuant to Article 16, Section 3(d) of the Contract, which provides for such a meeting at the request of the employee affected by a classification action. An informal meeting was held on November 9, 2007, among Paulger, Grievant and Grievant's VSEA Representative Gretchen Naylor.

26. During the informal meeting, Grievant contended that her position should be classified as a pay grade 22, Chemist III, position. Among the arguments made by Grievant was that her position should be classified the same as Edmond Luce, a PH Chemist III, because she did the same type blood lead work as him. Luce previously had been a Chemist II. He was made a Chemist III when he was appointed as Quality Control Coordinator for the laboratory. The quality control work duties of Luce are his primary duties, and differ from duties engaged in by Grievant.

27. By memorandum dated January 29, 2008, Paulger informed Grievant in pertinent part:

Based on the submitted Request for Classification, as well as the information provided at the informal meeting, I find that the Willis rating remains appropriate. The duties and performance expectations for this position are consistent with those of a Chemist II, pay grade 20.

...
(State's Exhibit 6)

28. Included with Paulger's memorandum was the following "Willis Ratings Analysis":

Knowledge & Skills: E1X – 184

Job Knowledge rating (E) indicates the need for full competence in a specialized or technical field. This is equivalent to a post-secondary degree or advanced degree plus sufficient experience in applying the principles and practices to a range of situations. This is appropriate as the position prepares and tests drinking water samples for various analyses. This also includes quality control testing. The position provides analytical results for reports concerning analyses performed; performs detailed maintenance and repair on laboratory instruments. Position functions in a lead-worker role by providing instruction to lower level laboratory technicians and lower level chemists.

Managerial Skills (1) is appropriate for most jobs in state government, indicating duties are within a sub-function of the department and do not include broader managerial responsibilities.

Interpersonal Communications Skills (X) indicates the positions at this level are expected to interact with others beyond the immediate work team. No special requirements exist, however, to influence or motivate the activities of others. Contacts tend to be limited to the exchange of information. The position interacts with laboratory customers to answer questions concerning contaminants in water, testing and test results, consultation with other Health Department staff and water supply operators regarding sample requirements and test schedules.

The points assigned (184) indicates the position having full competence in a specialized or technical field, including a comprehension of complex principles and practices.

Mental Demands: D31 – 61

Independent Judgment (D) is appropriate based on the position having a variety of varied and/or complex procedures that limit the latitude permitted for independent judgment used in following approved laboratory procedures for testing methods.

Problem Solving (3i) is selected due to the position being able to analyze problems containing a substantial degree and diversity of data that is generally required for routine, approved testing procedures.

Points are automatically assigned based on relationship with Knowledge & Skills points and selection of (i) within the problem solving component.

Accountability: D1S – 70

Freedom to Take Action (D) is based on the fact that characteristics of the position are such that activities and methods are generally defined, and/or efforts are reviewed after the fact. Day-to-day work product is subject to peer review.

Size of Impact (1) indicates a small impact on the organization (Health Department), and can be seen as an impact between 0 - \$500,000 budgeted dollars.

Nature of Impact (S) most jobs are supportive in nature in that they participate, influence and share in accountability for the end result, but do not fully control those end results.

Points assigned (70) represent the highest level of points for this rating configuration. This is appropriate considering the technical ability and scientific knowledge needed to perform duties safely and accurately while adhering to strict quality assurance standards.

Working Conditions: L2B – 9

The (L) is selected in Effort as duties performed by their nature cause a marked degree of fatigue.

The (2) is appropriate indicating that there is some danger of injury or probability of illness or physical harm is inherent in the job such as possible chemical exposure and/or lifting of chemical & sample bottles.

The (B) for Discomfort is appropriate based upon normal working conditions tending to be moderately disagreeable on occasion. The (B) level is used consistently throughout state government in related classes such as Environmental Analysts, Scientists, Laboratory Technicians, Chemists, and Microbiologists. The (B) also assumes normal use of protective clothing and observance of safety precautions.

The points selected (9) represent recognition that duties performed present some inherent danger of injury or illness. The points also take into consideration the mental stress of the short time turn around for analysis of samples, specimens ensuring that high quality standards are met on a required continual basis.

(State's Exhibit 6)

29. At the time Grievant's position was reclassified from PH Chemist III to PH Chemist II, the Willis Ratings and Points for the PH Chemist III position were as follows:

Willis Rating/Components:

Knowledge & Skills	E1N	212
Mental Demands	D4J	80
Accountability	D1S	70
Working Conditions	L2B	9
Total Points		371
...		

The Willis Ratings and Points for the PH Chemist III in 2007 were the same as existed in 2002 when Grievant's position was reallocated from the class Senior Chemist to PH Chemist III (State's Exhibit 13, Grievant's Exhibit 16)

30. In rating Grievant's position as E1X in Knowledge and Skills, rather than E1N, Paulger considered Grievant's interactions with doctors' offices. Paulger

determined that Grievant's responsibilities in this regard were limited to giving test results to doctors' offices, answering any questions from the doctors' office, and discussing with them steps to be taken based on the results. Paulger concluded that to receive the higher "N" rating, rather than "X", Grievant would be expected to engage in activities trying to influence doctors' offices to do something beyond what they normally would do. Paulger did not view Grievant's interactions with doctors' offices to reach this level.

31. Because Paulger's conclusion that Grievant's position was a Chemist II, Pay Grade 20, position was a change from the previous classification of Grievant's position, Paulger requested that classification analysts William Rose, Tammie Ellison and Julie Chenail independently review Grievant's position. Rose and Ellison concurred with the Chemist II, pay grade 20, classification. Chenail's conclusion was a little different.

32. At the time Grievant's position was reclassified from PH Chemist III to PH Chemist II, the PH Chemist III Job Specifications provided in pertinent part:

...

Class Definition:

Professional laboratory work within the Health Department Laboratory involving chemical analysis of samples and specimens and applied research . . . Work is distinguished from the Public Health Chemist II level by increased responsibility for complex analytical processes and contract contact with customers as well as a greater level of independent judgment.

Examples of Work:

Independently performs a full range of chemical analyses such as gamma spectroscopy, inductively coupled plasma-mass spectroscopy and advanced graphite furnace atomic absorption spectroscopy. Performs analysis on forensic samples and sensitive environmental samples. Provides expert testimony for legal proceedings in regard to analysis performed. May assume lead worker responsibility over other staff for specific time-limited projects. Assumes lead role for specific analytical test procedures. Maintains and troubleshoots sophisticated laboratory instrumentation. . .

...

Minimum Qualifications:

...

Ability to perform a wide range and large volume of chemical tests and procedures using a variety of techniques such as atomic absorption, gas chromatography, and atomic spectroscopy.

...

Education and Experience

Education: Bachelor's degree in a physical or biological science with at least 18 credit hours of chemistry.

Experience: Three years of professional level experience in a public health, environmental or related laboratory setting or two years of experience as a Public Health Chemist II. (State's Exhibit 11)

33. The phrase "atomic absorption spectroscopy" mentioned in the Chemist III job specification refers to blood lead testing.

34. At the time Grievant's position was reclassified from PH Chemist III to PH Chemist II, the PH Chemist II Job Specifications provided in pertinent part:

...

Class Definition:

Professional laboratory work within the Health Department laboratory involving and chemical analysis of samples and specimens and applied research. . . Work is distinguished from the Public Health Chemist I level by greater variety and complexity of analyses, assisting in the development of new analytical methods and greater variety and complexity of equipment used.

Examples of Work:

Performs a range of chemical analyses on a wide variety of materials and substances. Analyses include food and food products, drugs, water, beverages, clinical specimens, including blood tests for law enforcement agencies. Analyses include forensic and potentially infectious specimens, and environmental samples submitted during a public health emergency. Performs qualitative and quantitative analyses for organic, inorganic and radiological chemicals. Performs quality control procedures. Uses a variety of analytical techniques and instrumentation, ranging from standard chemical procedures for qualitative and quantitative analysis to sophisticated programmable chromatographs and spectrophotometers. May assist in the development or implementation of new analytical methods. . . Performs detailed maintenance and repair on laboratory instrumentation. . .

Minimum Qualifications

...

Ability to perform a wide range and large volume of chemical tests and procedures using a variety of techniques such as atomic absorption, gas chromatography, and atomic spectroscopy.

...

Education and Experience

Education: Bachelor's degree in physical or biological science with at least 18 credit hours of chemistry.

Experience: One year of professional level experience in a public health, environmental or related laboratory setting or one year of experience as a Public Health Chemist I.

...

(Grievant's Exhibit 1, p.000472-474)

35. The effective date of the classification action downgrading Grievant's position was February 4, 2007. The effective date was established by Paulger pursuant to Article 16, Section 3(e) of the Contract, set forth above in Finding of Fact No. 1 (State's Exhibit 14).

36. At the time this classification action was taken, Grievant initially received a lower rate of pay than she should have received under the February 28, 2006, stipulation referenced above. This was because Paulger made a mistake by not making the payroll unit of state government aware of the stipulation's requirement that Grievant's pay be "red-circled" in the event her position was downgraded. This error was corrected by "red-circling" Grievant's rate of pay according to the stipulation and providing Grievant with all the back-pay to which she was entitled due to the mistake.

37. Grievant filed a classification grievance concerning the classification action taken on her position. She contended that her position should have been classified as a pay grade 22, PH Chemist III. Grievant asserted that she performed similar duties to PH Chemist III Edmond Luce, and that her position also should be classified as PH

Chemist III. Her grievance was denied by Department of Human Resources Commissioner David Herlihy ((Grievant's Exhibit 1).

OPINION

We first address Grievant's contention that the State discriminated and retaliated against her due to her complaint and grievance activities in violation of Articles 5 and 15 of the Contract through its actions during the classification review process which culminated in the reclassifying of her position and reducing its pay grade from 22 to 20. Although Article 16 of the Contract provides that the grievance and appeal procedures provided in Article 16 "shall be the exclusive procedures for seeking review of the classification status of a position", the Board determined in a prior case that the exclusivity provision of Article 16 does not preclude an employee from grieving alleged sex discrimination, prohibited by the Contract, which occurred during the course of a classification review.¹ The Board reasoned that otherwise the expressed purpose of the parties set forth in Article 5 of the Contract to "achieve work relationships at every level which are free of any form of discrimination" would be frustrated. The same rationale and conclusion apply when an employee is alleging discrimination and retaliation due to complaint and grievance activities.

In cases where an employee claims that the employer took action against him or her for engaging in protected activities, the Board has determined that it will employ the analysis used by the United States Supreme Court: once the employee has demonstrated his or her conduct was protected, she or he must then show the conduct was a motivating factor in the decision to take action against him or her. Then the burden shifts to the

¹ Grievance of Lowell, 15 VLRB 291, 323-25 (1992).

employer to show by a preponderance of the evidence it would have taken the same action even in the absence of the protected conduct.² This so-called *Mt. Healthy* analysis has been employed by the VLRB in protected activity grievance cases involving filing of complaints and grievances.³ The Vermont Supreme Court has approved use of such analysis.⁴

A threshold issue in protected activity cases is whether an “adverse action” actually has occurred. The Vermont Supreme Court has indicated that “adverse action” should not be limited to dismissal, suspension, reprimand, adverse evaluation, diminished responsibilities, excessive work assignments or lost compensation.⁵ We conclude that the downward reclassification of Grievant’s position by two pay grades constitutes an adverse action.

Grievant engaged in the protected conduct of complaint and grievance activities. Grievant must demonstrate that this protected conduct was a motivating factor in the downward reclassification of her position. At the heart of any employment action allegedly linked with discrimination against an employee based on the employee engaging in protected activities is the question of employer motivation.⁶ The Vermont Supreme Court has held that, “because of the difficulty in proving that illegal considerations figure in the employer’s subjective motivation”, the Court has approved

² Grievance of Sypher, 5 VLRB 102 (1982). Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274 (1977). Grievance of McCort, (Unpublished decision, Supreme Ct. Docket No. 93-237, 1994).

³ Grievances of Cray, 25 VLRB 194 (2002); *Affirmed*, Sup.Ct. Dock. No. 2002-538 (November 6, 2003); Grievance of Brewster, 23 VLRB 314 (2000); Grievance of Cronin, 6 VLRB 37 (1983); Grievances of McCort, 16 VLRB 70 (1993), *Affirmed*, (Unpublished decision, Sup.Ct. Dock. No. 93-237, 1994); Grievance of Day, 16 VLRB 312 (1993); Grievance of Danforth, 22 VLRB 220 (1999), *Affirmed*, 172 Vt. 530 (2001); Grievance of Greenia, 22 VLRB 336 (1999).

⁴ Cronin, *supra*, (Unpublished decision, February 4, 1987); Morrissey, 149 Vt. 1 (1987); McCort, *supra*; Grievance of Robins, 169 Vt. 377 (1999).

⁵ In re Grievance of Murray, (unpublished decision, Supreme Ct. Docket No. 96-237, 1997).

⁶ Ohland v. Dubay, 133 Vt. 300, 302 (1975).

the practice of inferring unlawful motivation from the circumstances where no direct evidence of the employer's intent exists in the record.”⁷ An employer's unlawful motive may be inferred from the circumstances where no direct evidence of the employer's intent exists in the record.⁸

Among the factors to be considered in determining whether the protected conduct of engaging in protected activities was a motivating factor in an employer's decision to take action against an employee are: 1) whether the employer knew of the protected activities, 2) whether a climate of coercion existed, 3) whether the timing of the action was suspect, 4) whether the employer gave protected activity as a reason for the decision, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, and 7) whether the employer warned the employee not to engage in such activity.⁹

Although the downward reclassification occurred on the heels of complaint and grievance activity by Grievant, Grievant has not demonstrated that this activity constituted a motivating factor in the reclassification action. In general, an adverse employment decision following engaging in protected activity is not legally suspicious on its own.¹⁰ The Board and the Vermont Supreme Court have indicated that coincidence of timing, although cause for rigorous scrutiny, is not sufficient evidence standing alone of

⁷ Kelley v. The Day Care Center, Inc., 141 Vt. 608, 613 (1982). Grievance of McCort, 162 Vt. 481, 492-493 (1994). Grievance of Rosenberg and Vermont State Colleges Faculty Federation, 176 Vt. 641, 644 (2004).

⁸ Kelly v. The Day Care Ctr., Inc., 141 Vt. at 613.

⁹ Sypher, 5 VLRB at 131.

¹⁰ Rosenberg, 176 Vt. at 644.

improper motivation behind an adverse action.¹¹ In such cases, there must be some facts other than chronology alone to suggest that the timing of the employer's decision was suspicious.¹²

The fact that the State took a classification action shortly after Grievant engaged in grievance activities does not provide evidence standing by itself of discrimination resulting from grievance activities. This is because the position's responsibilities were changing and the State was mandated by a stipulation entered into by Grievant and her employer in settlement of the grievance to conduct a classification review of Grievant's position.

Nonetheless, Grievant contends that the Department of Health engaged in actions to adversely influence the classification process which contributed to the downward reclassification of her position, and that these actions were motivated by her complaint and grievance activities. Grievant asserts in this regard: 1) in violation of the terms of the stipulation, Grievant was required to perform significant ICP-MS duties, which duties were not mentioned in the Request for Review ("RFR") submitted by the Department of Health; 2) the Department of Health submitted the RFR initiating the classification process more than two months after the date set forth in the stipulation; 3) the submitted RFR inappropriately discounted the blood lead testing work done by Grievant; 4) the Department of Health acted in bad faith when submitting the RFR by not including the full range of Grievant's duties, and by not submitting an accurate listing of her job duties and responsibilities; and 5) the Department of Health manipulated the classification

¹¹ Id. *Vermont Education Association v. City of Rutland School Department*, 2 VLRB 186, 193 (1979). *Barre City Police Officers Association, AFSCME v. City of Barre*, 1 VLRB 223 (1978).

¹² Id.

process by introducing into the process after the RFR was submitted a grid developed by the Department on the job duties of the Chemist and Lab Technician series of positions.

The evidence on these matters does not support a conclusion that Grievant's complaint and grievance activities constituted a motivating factor in the downward reclassification of her position. The failure by the Department of Health to mention ICP-MS duties in the RFR is not suspect since Grievant had not performed such duties for more than three months preceding the filing of the RFR. Moreover, it was not evident during the time Grievant's position was undergoing a classification review that there were scheduled plans for Grievant to assume such responsibilities as part of her continuing job duties. Grievant also has not demonstrated that the failure to submit the RFR in a timely fashion caused an adverse effect on the classification of her position.

Grievant further has not shown that the RFR inappropriately discounted the blood lead testing work done by her. The RFR states as an "occasional" duty of Grievant to "(t)est samples/specimens using furnace atomic absorption". "Furnace atomic absorption" is a term used in connection with blood lead testing, and this was understood by the classification analyst conducting the classification review of Grievant's position. It was not misleading to indicate that Grievant did this work on an occasional basis given the evidence that Grievant was assigned to perform blood lead testing approximately on one week a month.

Upon review of the evidence in its entirety, we also conclude that Grievant has not proven her allegation that the Department of Health acted in bad faith when submitting the RFR by not including the full range of Grievant's duties and by not submitting an accurate listing of her job duties and responsibilities. She has not

demonstrated that the information submitted to the Department of Human Resources classification analyst, Molly Paulger, misrepresented the scope and importance of her duties and responsibilities.

Likewise, Grievant has not established that the Department of Health manipulated the classification review process by producing the grid on the Chemist and Lab Technician job series into the process after the RFR had been submitted. The evidence indicated that the grid was not prepared as an effort to manipulate the classification review of Grievant's position. Instead, it was prepared to support a decentralized allocation process the Department wished to engage in with the Department of Human Resources. The evidence indicated that similar decentralization efforts had occurred in other departments in state government. Moreover, although Paulger reviewed the information provided in the grid prior to making a classification decision on Grievant's position, Grievant has not established that Paulger placed much weight on the grid in reaching her decision.

Grievant further has not demonstrated that Paulger was motivated by the complaint and grievance activities of Grievant. Although Paulger was aware that the classification review stemmed from the settlement of a grievance initiated by Grievant, Grievant has not presented evidence demonstrating that this knowledge resulted in Paulger discriminating against her due to her protected activities.

Before concluding on the issue of alleged discrimination against Grievant due to her complaint and grievance activities, we note that we are troubled by evidence indicating that Grievant's superiors and the human resources specialist in the Department of Health met with Paulger after she issued her classification decision rating Grievant's

position as a Chemist II, and expressed the views that her duties were more like the lower-rated Chemist I position. The stipulation entered into by Grievant and the Department of Health requiring the classification review of Grievant's position provided that the RFR "will be submitted without a recommendation as to job title or pay grade". Given this agreement, it was inappropriate for Department of Health officials to approach Paulger to express the view that Grievant's job title and pay grade should be lower than decided by Paulger.

However, this ill-advised conduct by Department of Health officials did not affect any adverse action taken against Grievant. Paulger already had issued her classification decision, and she did not make any changes in the decision as a result of this meeting. There being no harm to Grievant, there is no remedy to grant her.

Grievant next alleges that she was subject to sex discrimination in the classification review of her position. In determining whether an employee was discriminated against on account of the prohibited factor of gender, the Board has adopted the analysis developed by the U.S. Supreme Court, which has set forth the basic allocations of burden and order of presentation in disparate treatment cases.¹³ The Court has made it clear that the burden of proof remains at all times with the employee.¹⁴ The Board has accepted this analysis in sex discrimination cases brought before the Board.¹⁵ The central focus of inquiry in a disparate treatment case is always whether the employer is treating "some people less favorably than others because of their . . . sex".¹⁶ To establish

¹³ McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

¹⁴ Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

¹⁵ Grievance of McIsaac, 26 VLRB 24 (2003). Grievance of Butler, 17 VLRB 247 (1994); *Affirmed*, 166 Vt. 423 (1997). Grievance of Lowell, 15 VLRB 291 (1992). Grievance of Smith, 12 VLRB 44 (1983). Grievance of Rogers, 11 VLRB 101 (1988).

¹⁶ Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

a disparate treatment claim, “it is the employee’s task to demonstrate that similarly situated employees were not treated equally.”¹⁷

The U.S. Supreme Court articulated the burdens of proof in disparate treatment cases, distinguishing between the burden of proof in a "mixed motive" case and a "pretext" case involving alleged sex discrimination.¹⁸ It is not clear whether Grievant is pursuing this allegation under a “pretext” theory or a “mixed motive” theory. We will analyze Grievant’s claim under both theories.

In a "pretext" case, the issue is whether the legitimate business reason offered by the employer for the adverse action is just a pretext for the real reason of discrimination.¹⁹ The issue in pretext cases is whether illegal or legal motives, but not both, were the true motives behind the decision.²⁰ In pretext cases, the analysis used is that which is set forth in U.S. Supreme Court cases.²¹

First, the complainant carries the initial burden of establishing by a preponderance of the evidence a *prima facie* case of discrimination.²² The burden of establishing a *prima facie* case of disparate treatment is not onerous.²³ The complainant must prove by a preponderance of the evidence that he or she was subject to an adverse employment action under circumstances that give rise to an inference of discrimination.²⁴ The U.S. Supreme Court stated:

As the Court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), the *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not

¹⁷ Butler, 166 Vt. at 431; *citing* Burdine, 450 U.S. at 258.

¹⁸ Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

¹⁹ Id.

²⁰ Id.

²¹ Burdine, *supra*. Lowell, 15 VLRB at 329.

²² Id.

²³ Burdine, 450 U.S. at 253. Lowell, 15 VLRB at 330.

²⁴ Id.

based on the consideration of impermissible factors". Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.²⁵

If the employee succeeds in proving the *prima facie* case, then the burden is shifted to the employer to articulate a legitimate non-discriminatory reason for the adverse action.²⁶ The employer need not persuade the court or the board that the proffered reason was the true motivation for the action. It must only raise a genuine issue of fact as to whether the employer engaged in discrimination.²⁷ To accomplish this, the employer must clearly set forth, through the introduction of admissible evidence, the reasons for its actions.²⁸

The employer must produce admissible evidence that would allow the court or the board rationally to conclude that the employer's actions had not been motivated by discriminatory animus.²⁹ The determination whether the employer has met the burden of production involves no credibility assessment.³⁰ If the employer fails to meet its burden of production, then the employee prevails on his or her claim of discrimination as a matter of law.³¹

Finally, if the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination.³² The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the

²⁵ Burdine, 450 U.S. at 254.

²⁶ Burdine, 450 U.S. at 253. Smith, 12 VLRB at 53.

²⁷ Burdine, 450 U.S. at 254.

²⁸ Id. at 255.

²⁹ Burdine, 450 U.S. at 257.

³⁰ St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2748 (1993).

³¹ Id. Grievance of Day, 16 VLRB 312, 344 (1993).

³² Burdine, 450 U.S. at 253. McDonnell Douglas, 411 U.S. at 804. Rogers, 11 VLRB at 126.

complainant remains at all times with the complainant.³³ A complainant may succeed in this burden of persuasion either directly by establishing that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.³⁴

Grievant contends that she was subject to gender discrimination because a co-worker, Edmund Luce, performed the same duties as her but his position was classified as a higher-rated Chemist III. In cases where there is an allegation of sex discrimination regarding compensation, a female employee may establish a *prima facie* case of discrimination by proving that she is paid less than a male employee for work requiring substantially equal levels of skill, effort and responsibility.³⁵

Grievant has not established a *prima facie* case of discrimination because she has not shown that she and Luce perform work requiring substantially equal levels of skill, effort and responsibility. Luce is the Quality Control Coordinator for the Department of Health laboratory. These quality control duties are his primary duties, and differ from duties engaged in by Grievant. Grievant has fallen well short of establishing that her duties require substantially equal levels of skill, effort and responsibility as those engaged in by Luce.

In a "mixed motive" case, the employee challenges an adverse employment decision on the grounds that the decision was the product of a mixture of legitimate and illegitimate motives.³⁶ Once an employee shows that a prohibited factor such as sex played a motivating or substantial part in an employment decision, the burden shifts to

³³ Burdine, 450 U.S. at 253. Rogers, 11 VLRB at 125-26.

³⁴ Burdine, 450 U.S. at 256. Lowell, 15 VLRB at 336.

³⁵ Lowell, 15 VLRB at 330.

³⁶ Price Waterhouse, 490 U.S. at 244- 249. Grievance of VSCFF (Re: Yu Chuen Wei), 18 VLRB 261,294 - 295 (1995)

the employer to prove that the same decision would have been made if the prohibited factor had not played such a role.³⁷ Direct evidence or circumstantial evidence may be used to show that one of the employer's motives was improper in "mixed motive" cases.³⁸ Direct evidence is evidence that, if believed, proves the existence of the fact in issue without inference or presumption.³⁹

Grievant has not established that gender was a motivating factor in the classification decision. As indicated above, she has not demonstrated that her duties require substantially equal levels of skill, effort and responsibility as those engaged in by Luce. She also has not made such a showing for any other higher-rated male employee. Thus, we conclude that Grievant has not met her burden of proving sex discrimination.

Grievant has raised other claims of discrimination and retaliation in her post-hearing brief. She contends that the Employer violated her whistle blowing rights provided in Article 65 of the Contract and the federal Equal Pay Act. We conclude that these issues are not properly before us because they were not raised in the grievance filed with the Board. We decline to resolve issues that were not raised in the grievance filed with the Board pursuant to Section 18.3 of Board *Rules of Practice*, which requires that a grievance contain a concise statement of the nature of the grievance. The Board will not consider the merits of an issue not raised in the grievance filed with the Board.⁴⁰

Grievant next contends that the Employer failed to determine Grievant's rate of pay after reclassification in accordance with Article 45, Section 12, of the Contract. The evidence on this issue indicates that, at the time this classification action was taken,

³⁷ Id. Grievance of McCort, slip op. at 11-15 (Vt. Supreme Court, Docket No. 93-237, 1994).

³⁸ Id.

³⁹ VSCFF (Re: Yu Chuen Wei), 18 VLRB at 295.

⁴⁰ Grievance of Davidson, 30 VLRB 337, 353 (2009). Grievance of Regan, 8 VLRB 340, 364 (1985). Grievance of Shockley and VSCFE, 5 VLRB 192, 202-203 (1982).

Grievant initially received a lower rate of pay than she should have received under the February 28, 2006, stipulation referenced above. However, this error has been corrected by “red-circling” Grievant’s rate of pay according to the stipulation and providing Grievant with all the back-pay to which she was entitled due to the mistake.

Given this evidence, we dismiss Grievant’s claimed violation of Article 45, Section 12, of the Contract. When the employer has provided as a remedy the most that the Board could award as a remedy, the Board has declined to rule on an issue even though the employer had not admitted to any contract violations.⁴¹ The Board reasoned that, to provide an adequate basis to assert jurisdiction, a grievance must be more than an argument over contract interpretation; it also must be a request for action that the Board has the authority to order.⁴² Here, the State has provided as a remedy the most that the Board could award as a remedy. Thus, we decline to rule on this issue.

Finally, Grievant contends that the reclassification of her position and reduction of her pay grade was arbitrary and capricious in violation of Article 16 of the Contract. Article 16 provides that an employee may appeal the final classification decision of the Commissioner of Human Resources to the Board. In such an appeal, the review is limited to “whether the decision was arbitrary and capricious in applying the point factor system utilized by the State to the facts established by the entire record . . . The board shall not conduct a *de novo* hearing, but shall base its decision on the whole record of the proceeding before, and the decision of, the Commissioner of Human Resources (or designee).”

⁴¹ Grievance of Vermont State Colleges Faculty Federation, AFT, UPV Local 3180, AFL-CIO, 28 VLRB 220, 235-236 (2006). Grievances of Cray, 25 VLRB 194, 216-217 (2002). Grievance of Rennie, 16 VLRB 1, 5-6 (1993). Grievance of Sherbrook, 13 VLRB 359, 362-63 (1990).

⁴² Id.

The arbitrary and capricious standard governing the Board's scope of review established by the contract means that the Board's scope of review in classification cases is extremely limited and that the Board is obligated to give substantial deference to the commissioner's decision.⁴³ An "arbitrary" decision is one fixed or arrived at through an exercise of will or caprice, without consideration or adjustment with reference to principles, circumstances or significance.⁴⁴ "Capricious" is an action characterized by or subject to whim.⁴⁵ Rational disagreement with an appellant's position, based on applicable classification principles, does not indicate arbitrary and capricious action.⁴⁶

Given the statutory responsibility of the Commissioner of Human Resources to ensure that State service has a uniform and equitable plan of compensation for each position based upon a point factor method of job evaluation,⁴⁷ the commissioner is obligated to ensure that contractual provisions relating to application of the point factor system to a position are carried out throughout the classification review process.⁴⁸ The Board has jurisdiction to review the commissioner's actions in this regard, where they may impact on the commissioner's own decision in applying the point factor system, because a decision reached in at least partial reliance on inappropriate considerations would be arrived at without consideration or reference to applicable classification principles.⁴⁹

Grievant contends that the classification decision was arbitrary and capricious because all the other chemists doing blood lead analysis were classified with a Chemist

⁴³ Appeal of Berlin, 15 VLRB 245, 246 (1992). Appeal of Cram, 11 VLRB 245, 246-47 (1988). Appeal of DeGreenia and Lewis, 11 VLRB 227, 229 (1988).

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Appeal of Smith, 17 VLRB 145, 149 (1994). Appeal of Berlin, 15 VLRB at 247.

⁴⁷ 3 V.S.A. §310.

⁴⁸ Cram, 11 VLRB at 247.

⁴⁹ Id.

III or higher designation and, despite her performance of the same duties, her position was classified at the lower Chemist II level. Grievant also asserts that the Willis Rating classification system was not used appropriately because she received an “X” rating for interpersonal rating skills rather than the higher “N” rating she had received in two previous ratings of her position. Grievant relies on her contacts with doctors’ offices to justify the higher rating.

We conclude that Grievant has not met the heavy burden of establishing that the classification decision was arbitrary and capricious in applying the Willis point factor rating system. Paulger rated the responsibilities of Grievant in blood lead testing primarily in the “Knowledge and Skills” component of the rating system. Paulger gave Grievant’s position a rating of “EIX” in this component with 184 points. 184 points is the highest number of points that can be obtained for a position receiving an “EIX” rating.

Grievant challenges the “X” portion of the rating, contending that it was arbitrary and capricious to not rate her position with the higher “N” rating. This component of the rating addresses “Interpersonal Skills”. Level X is described as follows in the Willis system: “Jobs at this level are expected to interact with others beyond the immediate work team. No special requirements exist, however, to influence or motivate the activities of others. Contacts tend to be limited to the exchange of information . . .” The higher Level N is explained as follows in pertinent part: “This level fits jobs in which influencing others is a major responsibility. It could be thought of as nudging others along a path in which they may be inclined to follow. . .”

In placing Grievant’s position at the “X” level, Paulger concluded that Grievant was not required to influence or motivate the activities of others beyond the immediate

work team; that her contacts tend to be limited to the exchange of information. Paulger determined that Grievant's duties in this regard generally were limited to interacting with laboratory customers to answer questions concerning contaminants in water, testing and test results, and consulting with other Health Department staff and water supply operators regarding sample requirements and test schedules.

Paulger specifically considered Grievant's interactions with doctors' offices. She determined that Grievant's responsibilities in this regard were limited to giving test results to doctors' offices, answering any questions from the doctors' office, and discussing with them steps to be taken based on the results. Paulger concluded that to receive the higher "N" rating, rather than "X", Grievant would be expected to engage in activities trying to influence doctors' offices to do something beyond what they normally would do. Paulger did not view Grievant's interactions with doctors' offices to reach this level. We conclude that Paulger's decision rating Grievant's position "X" rather than "N" reflected a rational application of classification principles, and does not indicate arbitrary and capricious action.

Also, Grievant has not established that the classification decision was arbitrary and capricious because all the other chemists performing blood lead analysis were classified with a Chemist III or higher designation. Grievant's focus on blood lead work to the exclusion of other job duties and responsibilities is not consistent with evaluation of jobs under the Willis system. Under the Willis system, a position's "actual job requirements form the only legitimate basis for evaluation". The "amount of specialized or technical knowledge required by the job" is measured, and a job is "measured in breadth (comprehensiveness) and depth (thoroughness)". These provisions make it clear

that a job is properly evaluated under the Willis system by a comprehensive review of duties and responsibilities.

Grievant points to the Chemist III and Chemist II's job specifications as evidence of a requirement that employees have to be designated at a Chemist III level or above to perform blood lead testing. The Chemist III job specification provides as an example of work "(i)ndependently performs a full range of chemical analyses such as . . . advanced graphite furnace atomic absorption spectroscopy". This refers to blood lead testing. The Chemist II job specification does not specifically mention "advanced graphite furnace atomic absorption spectroscopy" as an example of work to be performed. However, it does generally provide as "examples of work" that the position incumbent "(p)erforms a range of chemical analyses on a wide variety of materials and substances". It also includes within "minimum qualifications" the (a)bility to perform a wide range and large volume of chemical tests and procedures using a variety of techniques such as atomic absorption".

It is evident that the general provisions of the Chemist II job specification include within their potential coverage the performing of advanced graphite atomic absorption spectroscopy since this is a chemical analysis using the general technique of atomic absorption. This is consistent with the evidence presented at the hearing that Chemist I's, II's, III's or IV's can perform blood lead testing as long as they have appropriate training and are certified under Clinical Laboratory Improvement Act standards. In sum, we conclude that Grievant has not established a requirement that employees have to be designated at a Chemist III level or above to perform blood lead testing.

UORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the grievance and classification appeal of Margaret Sunderland filed in this matter is dismissed.

Dated this ____ day of August, 2010, at Montpelier, Vermont.

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ Leonard J. Berliner

Leonard J. Berliner

/s/ James C. Kiehle

James C. Kiehle